

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

PAUL A. WESBECHER, No. CIV S-04-0807-FCD-CMK

Petitioner,

ORDER

DANIEL FOY,

Respondent.

Petitioner, who is no longer in custody, is proceeding pro se and in forma pauperis for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. Pending before petitioner's request for a certificate of appealability (Doc. 44), filed on July 11, 2006.

Before petitioner can appeal this decision, a certificate of appealability must issue.

28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). A certificate of appealability may issue under 28 U.S.C. § 2253 “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). The court must either issue a certificate of appealability indicating which issues satisfy the required showing or must state the reasons why such a certificate should not issue. Fed. R. App. P. 22(b).

111

The timely filing of a notice of appeal is a jurisdictional requirement. See Scott v. Younger, 739 F.2d 1464, 1466 (9th Cir. 1984). The time limit for filing a notice of appeal following entry of judgment is thirty days. See Fed. R. App. P. 4(a). Petitioner's notice of appeal in this action was filed more than thirty days after entry of judgment. It is, therefore, untimely and cannot provide the court of appeals with jurisdiction. The issuance of a certificate of appealability cannot vest the court of appeals with jurisdiction if jurisdiction is not proper in that court. Cf. Hayward v. Britt, 572 F.2d 1324, 1325 (9th Cir. 1978) (addressing issuance of a certificate of probable cause). Because petitioner's notice of appeal is untimely, the court declines to issue a certificate of appealability.

Accordingly, IT IS HEREBY ORDERED that petitioner's request for a certificate of appealability is denied.

DATED:August 21, 2006

/s/ Frank C. Damrell Jr.
FRANK C. DAMRELL JR.
United States District Judge